ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:	)	
	)	ET Docket No. 97-99
Amendment of the Commission's Rules	)	
To Relocate the Digital Electronic Message	)	
Service From the 18 GHz Band to the	)	
24 GHz Band and To Allocate the	)	
24 GHz Band for Fixed Service	)	

MILLIMETER WAVE CARRIER ASSOCIATION, INC. REPLY TO OPPOSITIONS

MILLIMETER WAVE CARRIER ASSOCIATION, INC.

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SUMMARY

Teligent's opposition to the Millimeter Wave Carrier Association, Inc. ("MWCA") petition for partial reconsideration resorts to a welter of specious arguments and outright misstatements about what it terms "the only applicable national security precedent." In particular, the *Bendix* case that Teligent relies upon heavily *supports* MWCA's position that the allocation of 24 GHz spectrum required public notice and comment procedures under the Administrative Procedure Act ("APA"). Teligent is simply wrong in stating that the FCC "relocate[d] DEMS in exactly the same manner as it had relocated the radionavigation service to [13 GHz] . . . in *Bendix.*" In *Bendix, the FCC held a notice and comment rulemaking to allocate the 13 GHz band as replacement radionavigation spectrum.* In fact, this procedure is *exactly* the one MWCA has argued the Commission should have followed in the present case.

MWCA does not contest the legitimate use of the national security exemption to terminate non-Government operations in the 18 GHz band without notice and comment. The military has asserted an emergency need for the 18 GHz band that is inconsistent with DEMS use. No conclusions can be reached by the FCC other than to terminate the operations of DEMS incumbents.

The use of the military exemption to the APA under legitimate circumstances, however, does not then allow the FCC to bypass notice-and-comment procedures in allocating new spectrum at 24 GHz for displaced users. Use of this exemption is "only reluctantly countenanced" and the exemption is to be "narrowly construed." As a result, the law requires a nexus between the military function performed by the agency and the use of the national security exemption. In the present case, the only connection between military use of 18 GHz and the

rules for the 24 GHz band is that both allocations were made in the same order. Under Teligent's reading of this exemption, *any* FCC action could thus be immunized from public scrutiny. "Neither the statute, nor common sense, compels this result."

The FCC should have held a public rulemaking to allocate spectrum and develop service rules for DEMS at 24 GHz. Instead, the FCC conducted a private—and until recently, "off-the-record"—proceeding that implicates significant private gains (and commensurate public losses), sacrifices competition, and reverses long-standing FCC policies. The belated "record" in this proceeding, provided spontaneously only two days before petitions for reconsideration were due, raises more policy and technical questions than it answers and demonstrates that the FCC had sufficient time to conduct an expedited rulemaking under the APA. Indeed, because the overwhelming majority of 18 GHz systems are entitled to remain in that band until 2001, a rulemaking can *still* be conducted consistent with the relocation needs of incumbents.

Upon reconsideration, notwithstanding Teligent's attempt to confuse the issues by raising desperate, and legally untenable, arguments related to standing and due process, the FCC must reverse its decisions relative to the 24 GHz band. Ultimately, MWCA is in favor of allocating additional millimeter wave spectrum for wireless local loop usage and supports reasonable accommodations for licensees that are displaced due to national security concerns. But, the FCC can only legitimately make a determination that such an allocation is warranted—and related determinations on reasonable relocation parameters for DEMS incumbents—after full public notice and comment under the APA.

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MILLIMETER WAVE CARRIER ASSOCIATION, INC.
REPLY TO OPPOSITIONS

The Millimeter Wave Carrier Association, Inc. ("MWCA"), by its attorneys, herewith files its reply to the joint opposition of Microwave Services, Inc., Digital Services Corporation, and Teligent, L.L.C. (collectively, "Teligent") and the opposition of Teledesic Corporation ("Teledesic").[1] Solely by misstating the holding of what it characterizes as "the only applicable national security precedent" can Teligent even begin to defend the FCC's use of the military

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[1] Joint Opposition to Petitions for Reconsideration, Partial Reconsideration, and Clarification of Digital Services Corporation, Microwave Services, Inc., and Teligent, L.L.C., ET Docket No. 97-99 (filed July 8, 1997) ("Teligent Opposition"); Consolidated Opposition of Teledesic Corporation to Petitions for Reconsideration, ET Docket No. 97-99 (filed July 8, 1997) ("Teledesic Opposition"). These filings oppose petitions for reconsideration, partial reconsideration, and clarification of the Commission's *DEMS Relocation Order*. *See* Amendment of the Commission's Rules to Relocate the Digital Electronic Message Service from the 18 GHz Band to the 24 GHz band and to Allocate the 24 GHz Band for Fixed Service, 12 FCC Rcd 3471 (1997) ("*DEMS Relocation Order*"); *see also,* Petition for Reconsideration of BellSouth Corporation, ET Docket No. 97-99 (filed June 5, 1997); Petition for Reconsideration of DirecTV Enterprises, Inc., ET Docket No. 97-99 (filed June 5, 1997); Petition for Partial Reconsideration of the Millimeter Wave Carrier Association, Inc., ET Docket No. 97-99 (filed June 5, 1997) ("MWCA Petition"); Petition for Reconsideration of WebCel Communications, Inc., ET Docket No. 97-99 (filed June 5, 1997); Petition for Clarification of WinStar Communications, Inc., ET Docket No. 97-99 (filed June 5, 1997).

exemption to forego Administrative Procedures Act ("APA") notice and comment requirements in relocating and expanding the Digital Electronic Message Service ("DEMS"). As discussed below, the *DEMS Relocation Order* is manifestly contrary to law and the underlying principles of public participation. The *DEMS Relocation Order,* insofar as it establishes an allocation and service rules at 24 GHz, must be reversed. A new proceeding must be initiated that is consistent with APA notice and comment procedures.

I. INTRODUCTION

On March 14, 1997, the Commission issued the *DEMS Relocation Order* under the national security exemption to the notice and comment provisions of the APA. MWCA does not take issue with aspects of the order that are legitimately related to national defense. In particular, MWCA does not contest the need to terminate 18 GHz DEMS operations in order to avoid interference with planned military satellite systems. Nor does MWCA contest the FCC's invocation of the national security exemption to the APA to reallocate the 18 GHz band in a manner suitable for use by military systems.

The use of the national security exemption to exempt from notice and comment other wide-ranging spectrum allocation and policy decisions in the *DEMS Relocation Order*, however, is manifestly unlawful. The *DEMS Relocation Order* allocated spectrum in the 24 GHz band for DEMS on a nationwide basis. In so doing, the order adopted a 4:1 spectrum bandwidth equivalency for 18 GHz incumbents. By adopting a 4:1 equivalency ratio, the order effectively halved the number of DEMS channels available for licensing—without even acknowledging the loss of entry opportunities inherent in this approach. The *DEMS Relocation Order* provided incumbent licensees, but no other interested parties, with an opportunity to contest the license

modifications, which, unsurprisingly, yielded no formal complaints from incumbents.[2] Based on the lack of any licensee protests—and notwithstanding the filing of 5 petitions for reconsideration and clarification—on June 24, 1997, the Commission moved forward to issue the license modifications contemplated by the *DEMS Relocation Order*.[3]

Notably, in the *DEMS Relocation Order*, the adoption of the 4:1 spectrum equivalency ratio was based on a single page "technical" analysis. Two and one-half months after the *DEMS Relocation Order* was issued, and only two days before the petitions for reconsideration of that order were due, the record in the proceeding was "supplemented" by the FCC with a number of written communications from Teligent and Teledesic relative to the 24 GHz band.[4] These documents indicate that the FCC was actively discussing the reallocation of the 24 GHz band with Teligent and Teledesic in early December of 1996, nearly a month before the reallocation was "suggested" by the National Telecommunications and Information Administration ("NTIA") and three and one-half months before the issuance of the *DEMS Relocation Order*. These documents provide compelling evidence that a private proceeding was conducted "off-the-

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[2] One party, WebCel, did in fact oppose the license modifications. WebCel urged the Commission to "maintain the *status quo* by deferring issuance of any DEMS license modifications until a thorough reconsideration has been completed." Letter from Glenn B. Manishin, Counsel for WebCel Communications, Inc. to Hon. Reed E. Hundt, Chairman, Federal Communications Commission, dated April 23, 1997.

[3] Amendment of the Commission's Rules to Relocate the Digital Electronic Message Service from 18 GHz to 24 GHz and to Allocate the 24 GHz band for Fixed Service, ET Docket No. 97-99 (June 24, 1997) ("*DEMS License Order*").

[4] *See* Memorandum from Chris Murphy to William Caton, ET Docket No. 97-99 (filed June 3, 1997).

record" prior to the assertion that national security was involved as a basis to inhibit subsequent public participation.[5]

As discussed below, these actions are patently unlawful and must be reversed on reconsideration. The FCC must follow the lawful course set forth in both *Bendix* and *Independent Guard* and conduct a rulemaking in compliance with the APA before it allocates the 24 GHz band and adopts transition rules for 18 GHz incumbents.

II. THE MILITARY EXEMPTION TO THE APA CANNOT LAWFULLY BE EXTENDED TO AUTHORIZE THE ACTIONS TAKEN IN THE *DEMS RELOCATION ORDER*

As the basis for the rule of law for administrative agencies, exemptions to the APA are "narrowly construed" and only "reluctantly countenanced." Thus, courts have required agencies

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[5] No *ex parte* notifications were filed for the supplemental materials at the time the materials were originally submitted to the FCC. The nondisclosure of these materials is particularly disturbing where, as here, it appears the materials are directly relevant to resolution of a series of contested license modifications and the resolution of a petition for revocation by Teledesic against Teligent. *See* Consolidated Petition to Deny and Petition to Determine Status of Licenses of Teledesic Corporation, File Nos. 9607682 *et al.* (Sept. 6, 1996). Under Section 1.1208 of the Commission's rules, contested adjudicatory proceedings are deemed restricted and no *ex parte* contacts are permitted even if disclosed on the record. In fact, the Commission noted recently that restricted matters were implicated by the rulemaking, and it felt compelled to release a notice explicitly applying the "non-restricted" status to the rulemaking. *See* Commission Applies "Permit But Disclose" *Ex Parte* Rules to Proceedings Related to Relocation of the 18 GHz DEMS Licensees to 24 GHz Band, FCC Public Notice, DA 97-1282 (June 19, 1997). Despite that the order required parties to file notifications for any prior communications on these matters, *see id. at* 2, no notifications have been filed concerning the documents placed into the record on June 3, 1997, or for any other communications that may have occurred, including the oral *ex partes* referenced in the subject documents. *See, e.g.*, Letter from Rajendra Singh to Steve Sharkey, filed in ET Docket No. 97-99 as "Document #6" (dated January 14, 1997) (stating "[i]n our meeting on January 13, 1997"). No claim for a national security "exemption" to the *ex parte* rules has been advanced, nor could such a claim be made.

to meet stringent conditions before being permitted to limit important public rights under the APA. None of the necessary predicates have been met in this case. No precedent remotely suggests that far reaching 24 GHz policy and allocation decisions can be bootstrapped to military accommodations made in the 18 GHz band and thereby immunized from public scrutiny. Nor has the FCC demonstrated any emergency or exigency allowing it to bypass important public notice and comment requirements and justifying a private, "off-the-record" resolution of important policy and technical issues. Because the large majority of DEMS systems are not required to relocate until 2001, a rulemaking could *still* be conducted without harm to incumbents. And, for the two areas where relocation was required immediately, the record shows that the FCC had well over three and one half months to take public comment prior to terminating their operations. As discussed below, the type of compelling circumstances warranting exemptions to the APA do not exist in this case.

A. In an Attempt To Shield Its Windfall Gains From Public Scrutiny, Teligent Has Distorted Applicable Precedent

In its desperate attempt to protect private gains realized though the *DEMS Relocation Order*, Teligent has distorted the holdings of both of the applicable precedents in this case—*Bendix Aviation Corporation v. FCC* ("*Bendix*")[6] and *Independent Guard Ass'n of Nevada v.*

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[6] 272 F.2d 533, 541 (D.C. Cir. 1959), *cert. denied sub nom. Aeronautical Radio, Inc. v. United States*, 361 U.S. 965 (1960) ("*Bendix*"). Notably, Teligent has not even attempted to rebut MWCA's argument that sufficient grounds do not exist for the FCC to rely on the "good cause" exemption to the APA as a basis for foregoing notice and comment procedures. Teligent Opposition at 21-22.

O'Leary ("*Independent Guard*").[7] First, Teligent incorrectly relates the facts of *Bendix*, a prior case where the FCC reallocated spectrum for military operations under the national security exemption. Contrary to Teligent's assertions, in the *Bendix* case the FCC only allocated replacement spectrum *after* conducting a wholly separate proceeding compliant with APA notice and comment procedures. Second, Teligent misreads *Independent Guard* to eliminate the central holding—that a nexus must be established between a military function of an agency and the use of the national security exemption.

1. The *Bendix* Case Is In Direct Opposition to the Actions Taken in the *DEMS Relocation Order*

Teligent's sole argument defending the use of the military exemption in the *DEMS Relocation Order* is based on an egregious mischaracterization of *Bendix*. Teligent calls this case "the *only* applicable national security precedent" and states that *Bendix* is the "*benchmark* case involving the Commission's application of the national security exception."[8] It is true that the *Bendix* court did uphold the legality of the FCC's reallocating the 8.5-9.0 GHz radionavigation band for military systems without public notice and comment. The *Bendix* case, however, did *not* hold that it is permissible to reallocate *replacement spectrum* for displaced licensees without complying with APA procedures. In a patently incorrect reading of the *Bendix* case, Teligent states that "the Commission—without providing for public notice and comment—

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[7] 57 F.3d 766 (9th Cir. 1995) ("*Independent Guard*").

[8] Teligent Opposition at 11 (emphasis added).

made available the [13 GHz] . . . band as replacement spectrum for the displaced licensees."[9] In fact, in the *Bendix* case, *the Commission allocated 13 GHz spectrum for radionavigation systems only after conducting a public rulemaking subject to APA notice and comment procedures.*

The original FCC action culminating in the *Bendix* case was an April 18, 1958 order—adopted by the Commission without notice and comment—terminating non-government radionavigation operations in the 8.5-9.0 GHz band.[10] Ultimately, radionavigation systems were allocated spectrum in the 13 GHz band, but *not* in the *April Order*.[11] The *April Order* notes, in fact, that a separate companion NPRM was issued to allocate replacement spectrum:

> [I]n the interest of making [spectrum] available to non-Government users as quickly as practicable . . . in partial compensation for the loss of other non-Government bands, the Table of Allocations in Part 2 should also be amended now. In its Notice of Proposed Rule Making issued today in Docket No. 12404 the Commission has proposed allocation of these bands to specific non-Government services.[12]

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[9] Id. at 12.

[10] Amendment of Parts 2, 4, 7, 8, 9, 10, 11, 12, 16, And 21 Of The Commission's Rules and Regulations To Reallocate Certain Frequency Bands Above 24 Mc, Now Designated for Exclusive Amateur or Other Non-Government Use, to Government Services On a Shared or Exclusive Basis, and Conversely To Reallocate to Non-Government Use Certain Bands Now Designated for Government Use, 17 Rad. Reg. (P & F) 1505 (1958) ("*April Order*") (Attached as Exhibit A).

[11] Indeed, the 13 GHz band is not even mentioned in the *April Order*, and no ordering clause affects the 13 GHz band. *See April Order.*

[12] *April Order*, 17 Rad. Reg. (P & F) at 1506. See also *id.* at 1507 (stating "The Commission wishes to call attention to the fact that it has today taken . . . other actions which are related to the actions ordered herein. . . . [One action] is the issuance of a Notice of Proposed Rule Making in Docket No. 12404, which proposes various changes in the Commission's Table of Frequency Allocations.").

In its NPRM in Docket No. 12404, the companion to the *April Order*, the Commission did, in fact, propose to allocate the 13.25-13.4 GHz band for aeronautical radionavigation, replacing Doppler radar spectrum lost at 8.5-9.0 GHz.[13]

Subsequently, on July 31, 1958, the FCC issued a Memorandum Opinion and Order addressing petitions for reconsideration of the *April Order*.[14] The *July Order* notes that the *April Order* "effect[ed] certain immediate changes in [the FCC's] . . . Rules, the results of which were to reduce the amount of spectrum space available to non-Government services," and states that "[a]t the same time certain bands previously allocated to the Government or shared by the Government and non-Government services were designated for exclusive non-Government use."[15] In context, however, the latter statement obviously refers to the *April NPRM*, which was adopted on the same day as the *April Order* and released on the same day as the *April Order*. Notably, also on July 31, 1958, the Commission issued its order, based on the *April NPRM*, establishing the 13 GHz allocation for radionavigation.[16]

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[13] *See* Frequency Allocations and Radio Treaty Matters; General Rules and Regulations, Docket No. 12404 (April 18, 1958), *reprinted at* 23 Fed. Reg. 2698, 2699 (Apr. 23, 1958) ("*April NPRM*") (Attached as Exhibit B).

[14] Amendment of Parts 2, 4, 7, 8, 9, 10, 11, 12, 16, and 21 of the Commission's Rules and Regulations To Reallocate Certain Frequency Bands Above 24 Mc, Now Designated for Exclusive Amateur or Other Non-Government Use, to Government Services On a Shared or Exclusive Basis, and Conversely To Reallocate to Non-Government Use Certain Bands Now Designated for Government Use, 17 Rad. Reg. (P & F) 1587 (1958) ("*July Order*") (Attached as Exhibit C).

[15] *Id.* at 1589.

[16] Frequency Allocations and Radio Treaty Matters; General Rules and Regulations, Docket No. 12404 (July 31, 1958), *reprinted at* 23 Fed. Reg. 6111 (Aug. 9, 1958) (Attached as Exhibit D).

The *Bendix* case resulted from appeals of the *July Order*. These appeals, however, were not filed by entities challenging the legality of the allocation of radionavigation spectrum at 13 GHz. Rather, the incumbents in the 8.5-9.0 GHz band challenged the Commission's failure to use notice and comment proceedings before terminating their operations. Quite simply, because the Commission *did* follow APA procedures in allocating radionavigation spectrum to replace the 8.5-9.0 GHz band, and because such spectrum was allocated in a completely separate docket, the question of the legality of allocating replacement spectrum without notice and comment procedures was not—and could not have been—decided by the *Bendix* court.

Teligent also fails to note that the *Bendix* court considered as relevant a host of factors that are not present in the *DEMS Relocation Order*. First, the *April Order,* the *July Order*, and the *Bendix* case all note, beyond "vital national defense considerations," the "urgency" of the Government's request, the need for "immediate" action, and the "impracticality" of public notice and comment procedures.[17] As discussed in Section II(B), *infra*, no urgency, immediacy, or impracticality exists with respect to the 24 GHz band decisions. Second, as noted in the *July Order*, the FCC found that the "petitioners in a very real sense have *not* been deprived of an opportunity to be heard."[18] Specifically, the Commission observed that it had received comments in two related proceedings from the petitioners addressing their existing and future spectrum requirements. The *Bendix* court found the record in those other proceedings to be

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[17] *April Order*, 17 Rad. Reg. (P & F) at 1507; *July Order*, 17 Rad. Reg. (P & F) at 1591; *Bendix*, 272 F.2d at 536.

[18] *July Order*, 17 Rad. Reg. (P & F) at 1589. (emphasis in original).

"relevant" and a basis for the reasonableness of the Commission's conclusions in the *July Order*. In contrast, no public proceedings have requested comment on the 24 GHz band.[19]

Thus, Teligent's reading of the *Bendix* case is both factually and legally incorrect.[20] MWCA notes that, in fact, the *Bendix* case also directly rebuts Teligent's claim that it has some vested right as a licensee to be granted replacement spectrum on some *quid pro quo* basis. In *Bendix*, licensees were not relocated to the 13 GHz band; rather, the Commission allocated the 13 GHz band to meet the radionavigation needs previously served by systems in the 8.5-9.0 GHz band. No "equivalency" ratios or license modifications were contemplated or made in the *April Order*.[21] In fact, in every case where the Commission has set up a transition scheme for

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[19] *Bendix*, 272 F.2d at 542-43.

[20] Extension of the *Bendix* case to the *DEMS Relocation Order* implicates the very fears regarding abuse of the national security exemption voiced by the *Bendix* court. As the court noted, "[v]arious possibilities of abuse can be conjured were we to speculate," but the court was content that the Bendix case did not present even the "slightest suggestion" that there has been a "perversion of the Commission's administrative processes for an improper purpose." 272 F.2d at 539-40. As noted in Section I, *supra*, the same cannot be said to be true of the *DEMS Relocation Order*.

[21] *See also WBEN, Inc. v. United States,* 396 F.2d 601, 616 (2d Cir.), *cert. denied,* 393 U.S. 914 (1968) (limiting the power of pre-sunrise AM radio broadcasts without notice and comment under the "foreign affairs" exemption to the APA).

relocation of incumbents, it has done so pursuant to a band-specific public rulemaking.[22] Thus, Teligent has no absolute right to "replacement" spectrum.[23]

2. The Constraints Imposed on the Use of the Military Exemption In the *Independent Guard* Case Are Directly Applicable

In an effort to distinguish *Independent Guard*, the opposition has also misconstrued both the facts and the holding of that case. Indeed, the nexus between necessary military functions and the action undertaken in *Independent Guard* is significantly greater than in the *DEMS Relocation Order*, where no military use of the 24 GHz band is contemplated or suggested. Given the holding that the "military exemption" is available only where "the activities being regulated *directly* involve a military function,"[24] *Independent Guard* compels the conclusion that the use of the military exemption to allocate spectrum at 24 GHz and to adopt rules for use of that band by a private entity is illegitimate and contrary to law.

In *Independent Guard,* the Department of Energy ("DoE") promulgated regulations "applicable to all DOE and contractor employees assigned nuclear explosive duties."[25] Contrary to Teligent's implications, in *Independent Guard*, DoE did not promulgate rules solely applicable

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[22] Teligent's citation to the relocation regulations adopted by the Commission for 2 GHz incumbents is inapposite. Teligent Opposition at 25-27. The relocation of 2 GHz incumbents is clearly different; in that case, the incumbents were being relocated to allow operation of new commercial, for-profit systems by other non-government licensees. In this case, the relocation has been mandated to meet federal military needs. Thus, the 2 GHz transition rules are wholly different from the present case.

[23] 47 U.S.C. § 304.

[24] *Independent Guard*, 57 F.3d at 770.

[25] *Id.* at 768.

to civilians; rather, it was the application of universal guidelines to civilian personnel that was challenged. Here, the FCC promulgated rules effectively allocating and regulating spectrum both for DoD and for private entities performing no military function. Unlike *Independent Guards*, where a single, indivisible regulatory scheme applied to both military and non-military personnel, the allocation of military and non-military bands in the *DEMS Relocation Order* are entirely severable actions.

The *Independent Guard* court found that the District Court "correctly concluded that the DOE engaged in a military function when it researches and develops nuclear weapons."[26] Here, the FCC appears to be engaged in a military function when it allocates spectrum for DoD use.[27] The *Independent Guard* court held, however, that the existence of a military function, standing alone, is not sufficient to shield *any* administrative action from APA requirements. Specifically, the Court rejected DoE's application of the exemption because it found no nexus between the military function of DoE and the civilian contractors, even though the civilian guards in question were directly responsible for protecting military weapons. Here, no nexus whatsoever—whether direct or indirect—exists between the activities of 24 GHz licensees and military functions:

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[26] *Id.* at 769.

[27] Whether an agency is "military" or "civilian" is irrelevant under *Independent Guard*. Thus, attempting to distinguish *Independent Guard* by arguing that DoE is a civilian agency whereas here the DoD is invoking the exemption is specious. Teledesic Opposition at 10-11. The agency changing its rules is the FCC, and the FCC is the agency invoking the exemption, regardless of which entity originally suggested use of the exemption. In any event, as noted in *Independent Guard*, "[t]he statutory language . . . instructs us to look not to whether the overall nature of the agency promulgating a regulation is 'civilian' or 'military,' but to the function being regulated." *Independent Guard*, 57 F.3d at 769.

- The lack of any linkage between the military use of the 18 GHz band and the 24 GHz actions is amply demonstrated by the fact that the NTIA letters do not assert any interest in—or request the FCC to adopt any specific rules or relocation parameters for—the 24 GHz band, aside from measures necessary to protect existing FAA operations.

- The absence of any nexus between the military use of 18 GHz and the 24 GHz decisions in the *DEMS Relocation Order* is further underscored by the fact that the entire "technical" record relating to the 24 GHz reallocation consists of communications between Teledesic, Teligent, and the FCC—not a single technical input from NTIA on the 24 GHz band is reflected in the public record.

Clearly, the FCC could have arrived at substantially different conclusions for use of the 24 GHz band, none of which would have impacted military operations at 18 GHz in the least. The 24 GHz decisions of the *DEMS Relocation Order* were not "compelled" in any sense by military needs. The *only* relationship between the 18 GHz military band and the 24 GHz band is that both were reallocated in the same order.

As noted in *Independent Guard*, ensuring the adequacy of the nexus between military functions and the use of the military exemption is critical to avoid absurd results. The court explained that under DoE's reading of the exemption, DoE could promulgate, without notice and comment, regulations governing window washers' support activities and that "[n]either the statute, nor common sense, compels that result."[28] Teligent's reading of the exemption, like DoE's, would place no limits on what the FCC could do under the military exemption. Any rule could be modified merely by linking the action to an order containing some wholly independent military action. This interpretation defies both logic and law.

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[28] *Id.* at 770.

B. No Emergency, Exigency, Necessity or Other Impracticality Exists Warranting Use of the Military Exemption

It is well-settled that exceptions to notice and comment procedures of the APA should "be narrowly construed and only reluctantly countenanced."[29] Specifically, to bypass the notice and comment procedures under the guise of a military exemption there must be "[a] true and supported or supportable finding of necessity or emergency."[30] Here, there was no necessity or emergency that required the FCC to dispense with the APA's notice and comment procedures when it relocated incumbent DEMS operators to the 24 GHz band.

Although MWCA does not dispute the use of the national security exemption to terminate certain non-Government operations in the 18 GHz band on an emergency basis, there was no exigency requiring the relocation of incumbent 18 GHz providers to 24 GHz without notice and comment procedures. Under the *DEMS Relocation Order*, 18 GHz incumbents can continue to operate, except in two areas, until 2001. Moreover, if an emergency condition actually did exist, presumably the FCC would have acted when it first determined the need to relocate to the 24 GHz band. In this case, the Commission waited at least three and one-half months from when the shift was first proposed in early December to issue the *DEMS Relocation Order*, and the

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[29] *Independent Guard*, 57 F.3d at 769; *see also Hawaii Helicopter Operators Ass'n v. FAA*, 51 F.3d 212, 214 (9th Cir. 1995) (stating that "notice and comment procedures should be waived only when delay would do real harm"); *Tennessee Gas Pipeline Co. v. FERC*, 969 F.2d 1141, 1144 (D.C. Cir. 1992) (explaining that the "good cause" exception to the notice and comment procedures "should be limited to emergency situations" and should be "narrowly construed and only reluctantly countenanced"); *San Diego Sports Ctr. v. FAA* 887 F.2d 966, 970 (9th Cir. 1989) (failing to find an immediate emergency that would have excused the FAA's failure to go through the requisite notice and comment procedures).

[30] *Independent Guard*, 57 F.3d at 769.

initial license modifications were not even effective until May 5, 1997—five months after the relocation was first proposed. This delay demonstrates that no emergency compelled the FCC to shield the *DEMS Relocation Order* from public scrutiny and debate.

Arguably, the FCC should have known of a potential incompatibility even earlier than December 6, 1996. The 18 GHz band was originally allocated—without public notice and comment and based on military emergency—in July of 1995.[31] At that time, the FCC required "[c]oordination between Government fixed-satellite systems and non-Government systems operating in accordance with the United States Table of Frequency Allocations."[32] No explanation has been provided as to whether the required frequency coordination was performed and, if so, why the required frequency coordination did not disclose the potential incompatibilities.

Thus, the Commission had enough time to conduct an expedited rule making, which would have permitted the public and MWCA to comment on the technical and public policy issues pertinent to the relocation. If the FCC had proposed relocation rules in July of 1995, when the band was originally allocated, or even in December of 1996, when the shift of the DEMS to the 24 GHz band was first suggested, it could have received comments. It then could have issued a procedurally adequate rule on the same date that it issued its *DEMS Relocation Order.* Or, at least, it could have acted prior to the May 5, 1997, the date when the first license modification

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[31] *See Fixed Satellite Service in the 17.8-20.2 GHz Band*, 10 FCC Rcd 9931 (1995).

[32] *Id.* at 9935 (citing fn. US334 to 47 C.F.R. § 2.106).

was required. Instead, the FCC held a private proceeding, receiving comments only from two parties, thereby circumventing the APA's notice and comment procedures.

Further, there is no evidence on the record that the delay would have done any harm if the FCC, on March 14, 1997, had proposed a new rule instead of outright issuing an order.[33] The FCC was compelled to wait a 30 day period in any event to allow licensees to protest the proposed modifications. This time could have been used to allow notice and comment. At worst, the FCC could have conditionally provided for operations at 24 GHz for those two systems in Washington, D.C., and Denver, Colorado, that were required to be relocated on May 5, 1997. For the other systems, the minimal delay caused by a rulemaking would not have had any effect, because the *DEMS Relocation Order* allows them to continue to operate until January 1, 2001. Thus, the FCC has many years to complete a rulemaking before any exigency exists. Because exceptions to notice and comment procedures of the APA are to "be narrowly construed and only reluctantly countenanced," the *DEMS Relocation Order* can not be upheld absent some showing of exigent circumstances for bypassing the procedures.

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[33] *Cf. Hawaii Helicopter Operators Ass'n* 51 F.3d at 214 (finding that the FAA adequately explained taking emergency action and circumventing notice and comment because delay would have done real harm to the public).

III. DUE TO THE FAILURE TO ADHERE TO APA NOTICE AND COMMENT PROCEDURES, THE TECHNICAL AND POLICY DECISIONS MADE IN THE *DEMS RELOCATION ORDER* LACK A PROPER RECORD BASIS

A. The *DEMS Relocation Order* Illegitimately Reverses Long-Standing Policies By Granting Teligent a *De Facto* Monopoly in the New DEMS Band

The *DEMS Relocation Order* fundamentally changes the character and nature of the DEMS allocations. Nonetheless, Teligent makes the unprecedented (and factually incorrect) statement that "[n]othing in the *DEMS Relocation Order* reduces the number of DEMS channels."[34] As noted in the MWCA Petition, the order *halves* the number of channels available for high power DEMS operations. In halving the number of channels, and then granting all available channels in all major markets to Teligent and its affiliates, the Commission has granted Teligent a *de facto* monopoly in DEMS in a sharp reversal of its long-standing pro-competitive policies.

Demonstrating an appalling ignorance of the DEMS rules, Teligent insists that there were only five 18 GHz DEMS channels. As MWCA stated in its petition with citations,[35] however, there were originally 10 paired channels provided for high-power DEMS operations at 18 GHz. These channels were evenly split between the private operational fixed service and the common carrier microwave radio service. Although low-power operation is an *option* for the previously private channels under Section 101.147(r)(10), Section 101.147(r)(9) also authorizes operations on those previously private channels at power levels and technical parameters fully comparable

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[34] Teligent Opposition at 34.

[35] MWCA Petition at 9-10 n.11.

to the common carrier channels governed by Section 101.501 *et seq*. The *DEMS Relocation Order* terminates all high-power operations on all DEMS channels—but provides only five paired channels in the 24 GHz band. MWCA submits that altering the rules to decrease the number of DEMS channels available for high power operation from 10 to 5 "reduces the number of DEMS channels."

The reduction of the number of DEMS channels compounds the policy ramifications of the *DEMS Relocation Order* because fewer entry opportunities will exist at 24 GHz. In most new spectrum allocation proceedings, long-standing Commission open entry policies have dictated service-specific spectrum aggregation limits even where entry opportunities abound. In CMRS, for example, providers are not permitted to hold more than 45 MHz of cellular, PCS, and SMR spectrum in the same geographic area. Indeed, no entity was *supposed* to be permitted to acquire more than 1 of the 10 available DEMS channels at 18 GHz.

Whereas Teligent may previously have obtained, under some implicit waiver theory, rights to use the lion's share of the common carrier DEMS spectrum, with fewer channels available, Teligent is now receiving a *de facto* monopoly over all the DEMS spectrum. As noted in the 1996 Annual Report of the Associated Group, Inc. (now Teligent), Digital Services Corporation ("DSC"), Microwave Services, Inc. ("MSI"), and Teligent appear will be operating as a single entity for all practical purposes. The Annual Report further shows that the extent of Teligent's operations in the 24 GHz band will include 100 percent of the available 24 GHz DEMS spectrum in 16 of the top 36 markets, including 8 of the top 10 markets; and, 80 percent or more of the available 24 GHz DEMS spectrum in 27 of the top 36 markets, including all of the top 10 markets. Thus, the *DEMS Relocation Order* in effect awards *all* of the spectrum available

in a new allocation to a single entity in a sharp reversal of long-standing FCC policies favoring multiple market entrants.

B. The Late-Filed Material In this Proceeding Does Not Support the Technical Decisions in the *DEMS Relocation Order*

As previously noted, two days before the deadline for filing petitions for reconsideration, a substantial amount of material was suddenly filed in the docket. Because the public did not have access to this material in time to influence the Commission's decision in the *DEMS Relocation Order*, these *ex post facto* submissions are irrelevant and cannot be construed as a public record that legally justifies the actions taken in the order. In any event, however, even the artificially supplemented material does not support the conclusions arrived at in the *DEMS Relocation Order*. At a minimum, the supplemented materials indicate that reasonable engineering minds could differ on the effect of a move to 24 GHz and that the need for a 4:1 equivalency ratio is not self-evident.

For example, the memorandum dated December 5, 1996, from Mark Sturza to Russ Daggatt, forwarded to Steve Sharkey of the FCC by Larry Williams on December 6, 1996, states, if time division duplexing is used, 400 MHz at 24 GHz would "effectively quadrupl[e] the capacity of the DEMS compared to the 18 GHz allocation."[36] This completely contradicts the

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[36] *Id.* at 3. Sturza's suggestion of using time division duplexing is apparently an effort to counteract the increased cost and complexity of the transmit/receive filters. However, Sturza's analysis is presented for a 24 GHz allocation of 24.25-24.65 GHz, where the worst case difference between the center of a receive channel and the band edge of the nearest transmit channel are separated by only 295 MHz, a "parameter value" of 84. With the allocation of 25.25-25.45 GHz and 25.05-25.25 GHz, however, the worst case difference is 780 MHz, translating into a "parameter value" of 32, far better than the "parameter value" of 56 for DEMS

(Continued...)

Commission's finding that a 4:1 spectrum ratio is warranted to preserve throughput capacity at 24 GHz as opposed to 18 GHz. The memo also notes "[i]n summary, the only potentially significant issue is propagation losses," and that "for more typical conditions the difference is only 2 dB."[37] Sturza also observes that there are "non-technical advantages to the 24 GHz band."[38]

Even according to Teligent's analysis, the worst case loss from moving to 24 GHz is 12.8 dB, and the move actually provides an increase of 2.3 dB in antenna gain.[39] Thus, assuming Teligent's analysis is correct, the total loss is 10.5 dB. Conspicuously absent from any of the technical papers is any discussion about the possibility of merely raising the operating power of Teligent's systems by 10.5 dB. Inasmuch as the common carrier DEMS rules provide for operations at up to +55 dBW EIRP, and Teligent's systems appear largely to be proposed at -6 dBW transmitter output power with minimal antenna gain, there is well more than 10.5 dB of margin within the existing DEMS power rules. Yet, this option is not considered. The only statement regarding power is the statement from Teligent that "[a]t 24 Ghz [sic] it is difficult to maintain the same transmit power as at 18 ghz [sic]. . . . Any power increase will add to both cost

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at 18 GHz. Memorandum from Mark Sturza to Russ Daggatt, forwarded to Steve Sharkey of the FCC by Larry Williams on December 6, 1996, filed in ET Docket No. 97-99 as attachment to "Document #1" (dated Dec. 5, 1996) at 2.

[37] *Id.*

[38] *Id.*

[39] Overview of Fixed Broadband Wireless Local Loop System Using 18 GHz DEMS Band vs. 24 GHz Band, filed in ET Docket No. 97-99 as "Document #7" (undated) at 5.